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IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

No. 82-____

CHURCH OF SCIENTOLOGY MISSION OF DAVIS; and MARTIN SAMUELS,

Petitioners,

—v.—

JULIE CHRISTOFFERSON,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF OREGON

ERIC M. LIEBERMAN
Counsel for Petitioners
30 East 42nd Street
New York, New York 10017
(212) OX 7-8640

Of Counsel:

EMILY M. BASS
RABINOWITZ, BOUDIN, STANDARD, KRINSKY & LIEBERMAN, P.C.
30 East 42nd Street
New York, New York 10017
(212) OX 7-8640

CHARLES J. MERTEN
KAREN FINK
RICHARD YUGLER
MERTEN & FINK
117 S.W. Taylor
Portland, Oregon 97204
(503) 227-3157

December 1982

QUESTIONS PRESENTED

1. Whether the First Amendment prohibits a court from considering or deciding a lawsuit brought against a church by a former member of that church alleging that representations made to the former member by church staff members concerning religious practices and beliefs of the church were fraudulent?

2. Whether a jury may consider the truth or falsity of representations about religious practices and beliefs of a church if the jury first finds that the person making the representations did so for the purpose of raising money for the church, or for what the Court of Appeals of Oregon denominated a "wholly secular purpose"?

3. Whether the First Amendment prohibits a court from imposing punitive damages upon a church for the allegedly fraudulent representations of a staff member concerning the religious practices and doctrine of the church?

4. Whether the First Amendment prohibits a court from imposing damages upon a church for the purportedly fraudulent representations of a staff member concerning the religious practices and doctrine of the church, where the staff member's alleged denial of the religious character of the practices and representations was contrary to the official written policy, rules and regulations of the church as understood and accepted by the membership?

5. Whether a church may be required to carry the burden of proving the religious character and purpose of a staff member's representations about the church's religious practices and doctrines as a prerequisite to asserting that the First Amendment prohibits inquiry into the truth or falsity of the statements?

PARTIES TO PROCEEDINGS BELOW

The parties to the proceedings in the Court of Appeals of Oregon were:

The Church of Scientology Mission of Davis; Martin Samuels; The Church of Scientology of Portland; the Delphian Foundation; and Dennis Patton,

Appellants,

and

Julie Christofferson,

Appellee.

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JULIE CHRISTOFFERSON,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF OREGON

The Church of Scientology Mission of Davis ("Mission") and Martin Samuels petition that a writ of certiorari issue to review the judgment of the Court of Appeals of the State of Oregon insofar as that judgment remanded the case to the Oregon Circuit Court, Multnomah County, for a new trial on respondent's claim that the representations of mission staff members about the value of Scientology's religious practices were fraudulent.

OPINIONS BELOW

The opinion and judgment of the Court of Appeals of the State of Oregon (App. A, A1-A51)[1] is reported at 57 Or. App. 203, and at 644 P.2d 277. There are no other opinions.

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1 References to "(A ____)" are to pages in Appendix A to the petition, *post*. References to "App. B", "App. C", "App. D", and "App. E" are to appendices B, C, D, and E, *post*.

JURISDICTION

The judgment of the Court of Appeals of the State of Oregon was entered on May 3, 1982 (A1). Both petitioners and respondent filed petitions for rehearing with the Oregon Court of Appeals, which were denied on June 10, 1982 (App. B); petitions for review with the Supreme Court of the State of Oregon, which were denied on July 27, 1982 (App. C); and motions for reconsideration of the denials of review with the Supreme Court of the State of Oregon, which were denied on September 21, 1982 (App. D). This petition is being filed within ninety days of the denial by the Oregon Supreme Court of the motions for reconsideration of the denial of the petitions for review. The jurisdiction of the Court is invoked pursuant to 28 U.S.C. § 1257(3).

CONSTITUTIONAL PROVISIONS INVOLVED

The First Amendment to the Constitution of the United States provides:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

The Fourteenth Amendment provides, in relevant part:

> . . .No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT

This case involves a dispute between an ex-member of a religious movement and her former church concerning matters of religious doctrine and practice.

1. Petitioner Church of Scientology Mission of Davis (Mission) is a non-profit religious institution (A2, A38) incorporated in California in 1972. Petitioner Martin Samuels is an ordained minister in Scientology and President of the Mission (A2). The Court of Appeals of Oregon recognized that "Scientology is a religion and . . . the Mission is a religious organization entitled to invoke the protection of the Free Exercise Clause" (A38).[2]

Respondent Julie Christofferson is a former member of the Mission. After graduating from high school, she moved to Portland, Oregon in 1975 to be with her boyfriend who already was a member. At his suggestion, on July 13, 1975, she joined the Mission and enrolled in a communications course offered by the Mission (A5). For the next several months, Christofferson participated in religious courses and services offered by the Mission, including the central religious practice of auditing (A5).[3] During this time, respondent lived with friends and held a full-time job (A2).

At the time respondent joined the Mission and enrolled in the communications course, she was told and understood that the religious training programs of the Church were offered only to Church members (A40; Tr. 410, 412).[4] She read the

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2 *Accord, Founding Church of Scientology* v. *United States*, 409 F.2d 1146, 1160 (D.C. Cir. 1969); *Barr* v. *Weise*, 412 F.2d 338 (2d Cir. 1969); *Church of Scientology* v. *Siegelman*, 475 F. Supp. 950, 954 (S.D.N.Y. 1979). The nature of Scientology beliefs and practices is described in the Court of Appeals opinion (A2-A4).

3 The Court of Appeals found that the courses and services offered by the Mission were religious in nature (A39).

4 References to "Tr." are to pages in the trial transcript.

rules and regulations of church membership and agreed to them by her signature. Those rules and regulations emphasized the religious nature of Scientology, the courses, and the practice of auditing. They stated, in part:

> Scientology . . . is a spiritual and religious guide . . . Dianetics is practiced in the Church of Scientology as pastoral counselling, addressing the Spirit in relation to his own body and intended to increase well-being and peace of mind . . . Auditing is a pastoral counselling procedure by which an individual is helped, in stages, to recover his self-determination, ability and awareness of self, restoring respect for self and others . . . Scientology is an applied religious philosophy. . . The results claimed and benefits obtainable from auditing and training . . . are personal and are experienced by the individual himself or herself . . . The Church delivers auditing and training solely on the understandings contained in this booklet, and you are required to have carefully read and digested them before commencing any course or counselling.

C. A. App. 191-198.[5]

Respondent's membership application also emphasized the religious nature of Scientology beliefs and practices. It read:

> I, *Julie May Christofferson,* of *Eureka, Montana,* apply to the Church of Scientology for membership. I am willing to subscribe to the creed of the Church of Scientology, which is to assist the individual to become more aware of himself as an immortal being and to help him achieve the basic truths with regard to himself, his relationship to the physical universe and the Supreme Being, and to create, here on earth, a civilization of which all can be proud.

C.A. App. 199.

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5 References to "C. A. App. ____" are to pages in the Appellants' Appendix in the Court of Appeals of Oregon.

The respondent testified at trial that despite these unequivocal official written statements of the Mission as to the religious nature of Scientology and its practices, several weeks *after* she joined the Mission and began participating in its courses and practices, a staff member of the Mission told her that Scientology was not religious in nature, but claimed to be such for public relations reasons (Tr. 386).

In September 1975, plaintiff applied to become a provisional staff member at the Delphian Foundation, a non-profit educational institution founded by the Church of Scientology (A5). She began work there in early October, but was asked to leave in the beginning of December until and unless she could convince her mother to stop opposing her involvement in Scientology (*id.*).

Respondent went home to Montana for Christmas, but the visit ended with a quarrel with her mother. She returned to Portland in January 1976, but was not permitted to participate in courses or programs at the Mission. She returned home in April 1976 to try to convince her parents to accept her involvement with Scientology. When she returned home, her parents locked her in the house and forcibly "deprogrammed" her (*id.*).

2. One year later, respondent brought this action against eight defendants, including the petitioners.

Her seventh amended complaint, upon which the case was tried, alleged three causes of action: unlawful trade practices, fraud, and outrageous conduct. Both the unlawful trade practices and fraud causes of action were founded principally upon representations allegedly made by staff members of the Mission concerning the benefits of Scientology practices and courses. For example, staff members allegedly told Christofferson that auditing would develop creativity, enhance intelligence quotient, and allow one to control her emotions, neuroses, and psychosomatic ills. Other alleged representations concerned purported curative effects of auditing upon physical illness, the efficacy of the communications course with respect to study habits and the background of L. Ron Hubbard, the founder and spiritual leader of Scientology. Respondent alleged

that all the representations were false and fraudulent (A24-A26).

Respondent's third cause of action was for outrageous conduct. She alleged that the defendants attempted to brainwash her into service to them, and harassed her after she had been deprogrammed (A9, A21).

Prior to trial, defendants moved to dismiss and for summary judgment on the grounds, *inter alia,* that the First Amendment prohibited judicial inquiry into a dispute between a church and an ex-member on matters of religious belief and practice, particularly where the resolution of the dispute would require the court to decide the truth or falsity of religious doctrine. The motions were denied without opinion. Also denied were motions by the defendants to strike all claims based upon representations concerning religious practices and beliefs, and demands for punitive damages. Since Oregon law authorizes a plaintiff seeking punitive damages to present evidence of the financial status of the defendants, the trial court permitted extensive discovery of the finances of the Church and the Mission.

The trial proceeded against five defendants, including the petitioners, the Delphian Foundation, the Church of Scientology of Portland (COSOP), a separately incorporated religious organization with which plaintiff had had no significant contacts, and Dennis Patton, a staff member of the Mission.

At the trial, respondent presented no evidence that the defendants used force or the threat of force to induce her membership or participation in Scientology. Nevertheless, the respondent's attorney was permitted to refer repeatedly to Scientology as a "destructive cult" and to draw out of his witnesses comparisons of Scientology with North Korean torturers of American prisoners of war, the People's Temple, and various other controversial or unpopular religious organizations. In his final argument, respondent's counsel told the jury over objection:

> They made her into a totally different person, totally obedient and subservient. Just like they have proudly with ten thousand other young people in Oregon. . . . They do it today, they did it last night, they are going to do it

> tomorrow. Ten thousand people have been tricked, lied to and deceived by this religion. These people have come like locusts from Davis, California . . .
>
> * * *
>
> Why are they doing this? Why is the City being subjected to this?
>
> Why has this State been taken over? . . .
>
> * * *
>
> You can read . . . all of these exhibits. You can read every one and you will not find a doctrine of love or charity. You will not find sympathy to the Good Samaritan. You won't find trust, morality. You won't find words of sharing and loving in any type of language that you can understand or anyone else can understand. They did this to Julie. They have done this to others. And they are going to do it. They are going to change our city and our state. . . . Only you have the power to stop this type of conduct.

Tr. 3344.

The jury returned a verdict of $2,067,000.20 on the fraud and outrageous conduct causes of action against the petitioners, Delphian, and COSOP. Of that amount, $3,000.20 constituted compensatory damages for out-of-pocket expenses, $150,000 constituted compensatory damages for mental distress, and $1,914,000 constituted punitive damages.

3. The Oregon Court of Appeals reversed the judgment. It held as a matter of state law that the conduct of the defendants was not actionable as outrageous conduct, and that the defendants' motion for directed verdicts on that cause of action should have been granted (A9, A21, A24).

With respect to the fraud cause of action, the Court of Appeals held that there was insufficient evidence to hold the Church of Scientology of Portland and the Delphian Foundation liable (A28, A31), but remanded for a new trial against the petitioners. In addressing the petitioners' First Amendment defenses to the fraud allegation, the Court of Appeals held that Scientology is a religion and that the Mission is a religious

organization entitled to invoke the protection of the Free Exercise Clause (A38). It further held that the courses and auditing in which respondent participated and about which the alleged false representations were made were part of the religious beliefs and practices of Scientology (A39).

Despite these findings, however, the Court of Appeals held that representations about the efficacy of the religious courses and auditing of Scientology could lose their religious character and be the basis of a civil action for fraud against the defendant Mission if the persons making the representations denied their religious character and made the representations "for a wholly secular purpose." The court further held that determination of the questions of subjective purpose and thus religious character of the representations was properly one for the jury, that the Mission carried the burden of proving the religious purpose and character of the representations, and that if the jury found a secular purpose it could go on to find that the representations themselves were false and fraudulent. Finally, the court defined a secular purpose as any purpose other than to induce a person to join a church or participate in its practices, and gave as an example of such a secular purpose an intent to raise money for the church.

The Court of Appeals reversed the judgment for the respondent on the fraud cause of action, however, on two grounds. It held that the trial court had improperly instructed the jury to consider the sincerity of the Mission in making the representations, rather than the purpose of such representations (A44), and to determine whether each individual representation, standing alone, was protected as religious. Having found that the jury was improperly instructed in these two respects, the Court of Appeals remanded for a new trial consistent with its opinion.

The Court of Appeals also rejected the petitioners' argument that it was improper to impose punitive damages against a church for the allegedly fraudulent representations of church staff members (A49-51). The Court of Appeals failed to address explicitly petitioners' argument that the Mission could not be held liable at all on a *respondeat superior* basis for such statements by staff members.

REASONS FOR GRANTING THE WRIT

1. This case raises substantial questions under the First Amendment as to whether and to what extent the courts may hear and decide a case brought against a church by a former member alleging that the church's representations about its religious practices are fraudulent and that the church's non-coercive religious practices[6] are tortious. In holding that such allegations raise triable questions upon which juries can award compensatory and punitive damages, the Oregon Court of Appeals has severely undermined the critical "wall of separation between church and state," *Everson* v. *Board of Education*, 330 U.S. 1, 16 (1946), which this Court and other courts have erected for over a century to ensure the public's right to freedom of religious exercise and speech. *See Watson* v. *Jones*, 13 Wall. (80 U.S.) 679 (1872);[7] *United States* v. *Ballard*, 322 U.S. 78 (1944); *Founding Church of Scientology* v. *United States*, 409 F. 2d 1146 (D.C. Cir. 1969);[8] Tribe, *American Constitutional Law*, ¶ 14-12, at 865-880.

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6 By "non-coercive religious practices" petitioners mean religious practices, such as those which existed in this case, about which there is no claim that the religious organization utilized force, the threat of force, or other physical or chemical means to induce the parishioner to join the organization, participate in its practices or services, or remain a member or participant.

7 [T]he judicial eye cannot penetrate the veil of the church for the forbidden purpose of vindicating the alleged wrongs of excised members; when they became members they did so upon the condition of continuing or not as they and their churches might determine, and they thereby submit to the ecclesiastical power and cannot now invoke the supervisory power of the civil tribunals.

Watson v. Jones, 13 Wall. at 731, quoting from *Ferraria* v. *Vasconcelles*, 23 Ill. 456.

8 [U]nder *Ballard* it seems unlikely that a disgruntled former adherent could sue a church for fraud and deceit because it had collected money from him on the basis of allegedly "false" doctrines concerning salvation, heaven and hell—or for that matter on the basis of doctrines, such as those of the Christian Scientists, concerning the cause and cure of disease.

409 F.2d at 1156, n. 32.

The questions have assumed great national and constitutional importance at the present time not only because of the fundamental nature of the rights of religious free exercise involved, but also because this particular case has served as a model for the institution of scores of damage actions brought throughout the country against newer or controversial religions by disaffected members of such churches.[9] Following the two million dollar punitive damage award in this case, personal injury lawyers, sensing a new "target" defendant, instituted over twenty-five similar damage claims against the Church of Scientology alone, including a class action lawsuit seeking attachment of the property of various Scientology churches and the appointment of a court receiver to administer the Church.[10] Similar lawsuits were also brought in volume against other churches, including the Unification Church,[11] the International Society for Krishna Consciousness,[12] and even the Catholic Church, and various Protestant sects.

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9 We set forth in Appendix E to this petition a table listing recent cases brought against religious organizations by former members alleging fraud, brainwashing, or mind control. The table lists the name of the case, the nature of the allegations, and the present status of the case and judicial disposition, if any, of the religious free exercise issues raised in the present petition.

10 *Van Schaick* v. *Church of Scientology of California, et al.*, 535 F. Supp. 1125 (D. Mass 1982). The district court has dismissed the class action allegations and denied requests for attachment and appointment of a receiver.

11 Various courts have recognized "that the Unification Church has religion as its primary purpose", *Holy Spirit Association for the Unification of World Christianity* v. *New York State Tax Commission*, 55 N.Y.2d 512, 518-519 (1982), and that " . . . the Unification Church by any historical analogy, philosophical analysis or judicial precedent . . . must be recognized as a bona fide religion." *Unification Church* v. *Immigration and Naturalization Service*, ___ F. Supp. ___, Civil Action No. 81-1073 (D.D.C. September 16, 1982), slip op. at 10. *See also*, *Ward* v. *Connor*, 657 F.2d 45 (4th Cir. 1981); *Troyer* v. *Town of Babylon*, 483 F. Supp. 1135, 1137 (E.D.N.Y. 1981)(Weinstein, J.).

12 The Krishna Consciousness movement has been recognized as a religion under the First Amendment. *International Society for Krishna Consciouness* v. *Barber*, 650 F.2d 430 (2d Cir. 1981).

Central to the complaints in this veritable flood of post-*Christofferson* religious fraud litigation are allegations virtually identical to those made in the present case: that representations about the religious practices and beliefs of the churches were false and are actionable because they were made for the purpose of obtaining funds for the church, and/or that the practices of the churches are outrageous and tortious because they constitute mind control, brainwashing, and the like.

Neither the Oregon Court of Appeals in this case, nor the other state and federal courts before whom the post-*Christofferson* cases have been filed, have properly analyzed or applied the critical First Amendment doctrine which must prohibit such litigation, absent claims of the use of physical force such as kidnapping or battery.[13] The opinion of the Oregon Court of Appeals in this case, while properly recognizing the religious status of the defendants and their religious practices, nevertheless substantially encourages such litigation by permitting inquiry into the truth or falsity of statements about religious practices based upon a secular purpose of a speaker, and by permitting damages, including punitive damages, to be awarded against a church for the unauthorized speech of staff members. In fact, the opinion of the Oregon Court of Appeals is so self-contradictory and ambiguous on the questions of good faith, religious context, and secular purpose[14] that both

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13 In fact, one court has just dismissed a religious fraud case precisely on the grounds urged in the text. *Eden* v. *Moon, et al.*, Circuit Court of Wayne County, Michigan, Case No. 77-736880-NO (December 3, 1982)(unreported oral decision of Judge Sharon Tevis Finch). Judge Finch's opinion hardly provides the definitive ruling necessary to put an end to the tide of religious fraud litigation.

14 On the one hand, the Oregon Court of Appeals quite properly held that the jury may not inquire into the good faith or sincerity of an entire church (A44, 45), distinguishing this case from cases in which the sincerity of the claims of religious beliefs of an individual are relevant. The Court of Appeals noted the conceptual and practical difficulties of an inquiry into corporate sincerity (A44):

the plaintiff and the defendants unsuccessfully petitioned that court for reconsideration so that it could clarify its opinion on those questions. The federal district court in Massachusetts addressed similar issues in *Van Schaick* v. *Church of Scientology of California*, 535 F. Supp. 1125 (D. Mass. 1982), but it, too, left open more questions than it answered.[15] And the

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> In the situation presented here, it is difficult to determine whose sincerity or good faith the jury could be asked to determine. Is the religious organization to be held liable if one of its ministers is less than a true believer? Or is it to be saved from liability if the individual who makes the statement truly believes, but others in the church do not?

The Court of Appeals then turned around and sanctioned just such an inquiry, however, by its discussion of religious context and purpose. It noted that in order to claim First Amendment protection, a religious organization must give notice that it claims to be religious. The Court of Appeals held that representations about religious practices would not be entitled to constitutional protection if they were made on a "wholly secular basis" (A42). The Court then applied a subjective test to determine the question of religious context, *i.e.*, "whether the statements were made for a wholly non-religious *purpose*." The Court did not explain how its "purpose" test would avoid the same infirmities as would the "sincerity" test it rejected, *i.e.*, whose "purpose" the jury could be asked to determine.

A similar anomaly exists with respect to the Court of Appeals' application of its "wholly secular purpose" test. The Court held that:

> A wholly secular purpose means that, at the time they were made to this plaintiff, the statements were made for a purpose other than inducing plaintiff to join or participate in defendants' religion.

(A45). Yet, the plaintiff's entire case was dedicated to proving precisely that the purpose of the representations was to induce the plaintiff to join the Mission and participate in its religious training and practices. The Oregon Court of Appeals nevertheless remanded for a new trial.

15 In *Van Schaick*, District Judge Garrity also struggled with the question of the context in which representations about religious practices are made. Since he was deciding a motion to dismiss, Judge Garrity was required to take as true allegations of a complaint that auditing was held out to Van Schaick as a purely scientific process with no religious overtones. Judge Garrity expressed skepticism about the allegations of the complaint, and suggested that the religious fraud issues be raised in a motion for summary judgment, which the Church of Scientology subsequently filed. Immediately after the motion was argued, the plaintiff voluntarily dismissed the religious fraud allegations.

dangers of the present state of undefined judicial standards were demonstrated in the recent case of *Colombrito* v. *Kelly*, ____ F. Supp. ____, 79 Civ. 6205 (RO) (S.D.N.Y. 1982), in which a federal district court in a private damages action undertook its own broad inquiry into the religious *bona fides* of the Unification Church by requiring the testimony of Reverend Sun Myung Moon, the founder of that church, about the nature of his religious beliefs, practices and experiences. The district court proceeded on the theory that such beliefs, practices and experiences might be shown to be so incredible as to demonstrate not only the insincerity of Reverend Moon, but the fraudulent nature of the entire church. While the Court of Appeals for the Second Circuit quite properly ordered the termination of the district court's inquiry and the striking of the testimony,[16] the damage caused to the Unification Church, and to the First Amendment non-entanglement principles, was not so easily undone, *cf.*, *Maness* v. *Myers*, 419 U.S. 449, 460 (1975), especially since the Second Circuit did not articulate principles or standards which would limit such inquiry in the future.

It remains for this Court to articulate the constitutionally mandated standards which prohibit religious fraud tort actions such as the present case. It is especially essential that the Court perform that role now, to provide religious institutions with the necessary "breathing space" to survive and grow under our system of constitutionally protected religious liberty. *Cf.*, *NAACP v. Button*, 371 U.S. 415, 433 (1963). As the Court has emphasized, in cases such as this, "[i]t is not only the conclusions that may be reached . . . which may impinge on rights guaranteed by the Religion Clauses, but the very process of inquiry leading to findings and conclusions." *NLRB* v. *Catholic Bishop of Chicago*, 440 U.S. 490, 502 (1979). Unless the Court acts now, the process of improper inquiry will go forward against various religious institutions in numerous cases around the country, inspired by the extraordinary and

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16 *In Re Holy Spirit Assn. for the Unification of World Christianity, et al.*, Docket No. 82-3035 (May 28, 1982).

unconstitutional results of the trial which occurred in this case, and further encouraged by the opinion of the Oregon Court of Appeals.

Indeed the present flood of religious fraud litigation not only constitutes an unconstitutional intrusion upon religious institutions and their members, it also imposes an unacceptable burden upon the already overtaxed dockets of the state and federal judicial systems. A clear statement by this Court of the constitutional limitations upon such litigation will go a long way toward ending this form of frivolous but time-consuming litigation, thereby enabling the courts to devote their resources to cases properly before them.

2. The Court of Appeals decision that a jury may determine the truth or falsity of oral representations to a church member concerning concededly religious practices and beliefs of the church, if the jury first finds that the "purpose" of the person making the representations was "wholly secular," is contrary to the decisions of this Court and critically undermines the zone of constitutional protection for religious minorities created by those decisions.

In *United States* v. *Ballard*, 322 U.S. 78 (1944), a fraud case, the Court held that neither judges nor juries may decide the truth or falsity of representations concerning religious dogma or the efficacy of religious practices, even where the representations could be demonstrated to be preposterous to a non-believer. 322 U.S. at 87. *Accord, Cantwell* v. *Connecticut*, 310 U.S. 296, 305 (1940); *Thomas v. Review Board*, 450 U.S. 707, 101 S. Ct. 1425, 1429 (1981); *Founding Church of Scientology* v. *United States*, 409 F.2d at 1155.

The Oregon Court of Appeals, while paying lip-service to *Ballard*, created an exception that, in an atmosphere of hostility to an unpopular minority religious sect, would wholly swallow up the constitutionally necessary *Ballard* rule. According to the Oregon court, a jury need merely find first that the person making the representation about a religious practice was subjectively motivated by a secular purpose; once having made that finding, the jury would be free to deny the religious

character of the representations, to reject as factually false and fraudulent the entire doctrine and practices of the church, and to find the church liable in damages therefor.

The Court of Appeals' test is constitutionally flawed in at least two fundamental ways. First, the constitutional barrier to judicial inquiry into the truth of religious belief does not turn at all on the subjective purpose of the speaker, but rather on the inherent incompetence of a court to pass judgment on the question. Once it is acknowledged, as the Court of Appeals did below, that the representations concern religious belief or practice, a court simply may not inquire further into the truth or falsity of the representations consistent with the First Amendment. Religious beliefs and practices do not lose their religious character because a court or jury decides that they were discussed for secular reasons.

Second, the Court of Appeals' test provides no protection against, and indeed establishes a non-reviewable mechanism for, the exercise by juries of prejudice against unknown, controversial, or unpopular minority religious sects. The test would invite jurors who view the religious doctrines of such sects as preposterous or dangerous to impute a "secular" purpose to the propagators of such beliefs as a first step toward finding the doctrines themselves to be actionable as fraud. This Court repeatedly has noted that prejudices against such sects have existed in virulent form throughout history, and the Court has warned that the First Amendment requires that the judiciary insure that neither the courthouse nor the jury box be used to give sanction to or to legitimize such prejudices. *See, West Virginia State Board of Education* v. *Barnette*, 319 U.S. 624, 640-42 (1943).

The dangers to First Amendment rights of the approach of the Oregon Court of Appeals is dramatized by its own inability to differentiate secular from religious purposes. Under the Court of Appeals rule, the only permissible religious purpose of speech, and hence the only religious speech protected by the *Ballard* doctrine, is speech intended to cause a person either to join a religious organization or to participate in its practices or services (A45). Representations about religious dogma or prac-

tice made for any other purpose, such as to explain the religion, to encourage tolerance of it, or to compare it with other religions, would subject the entire doctrine to judicial inquiry and sanction.

Indeed, even the purposes identified as "religious" by the Oregon Court of Appeals—to induce membership or participation—apparently would not always provide protection. For example, in this very case, the plaintiff herself alleged that the *purpose* of the representations made to her was to induce her to join the Church of Scientology and to participate in its central religious practice, auditing. That is precisely what occurred. The Court of Appeals nevertheless sanctioned a new trial in which, presumably, a jury could inquire into whether the attempt to induce Christofferson to join the Mission or participate in its concededly religious practices was motivated by non-religious reasons. Thus, the Court of Appeals "secular purpose" test would permit a jury to reject the stated nature, purpose and effect of the religious representations, and to find a hidden secular purpose based upon its own review of the practices of the religious organization or the motives of one of its staff members.

Further, the holding of the Oregon Court of Appeals that a purpose to raise money for the Church is secular, thereby subjecting the religious representations made to judicial inquiry as to truth or falsity, is wholly inconsistent with the decisions of this Court.

> [T]he mere fact that religious literature is "sold" by itinerant preachers rather than "donated" does not transform evangelism into a commercial enterprise. If it did then the passing of the collection plate in church would make the church service a commercial project. The constitutional rights of those spreading their religious beliefs through spoken and printed words are not to be gauged by standards governing retailers or wholesalers of books . . . . It is plain that a religious organization needs funds to remain a going concern. . . . Freedom of speech,

> freedom of the press, freedom of religion are available to all, not merely to those would can pay their own way.

Murdock v. *Commonwealth of Pennsylvania,* 319 U.S. 105, 111 (1943). *See also, Cantwell* v. *Connecticut,* 310 U.S. 296, 307 (1940); *Heffron* v. *International Society for Krishna Consciousness,* 452 U.S. 640 (1981); *Larson* v. *Valente,* ____ U.S.____, 102 S. Ct. 1673 (1982).

The opinion of the Oregon Court of Appeals would have subjected the religious literature of Murdock, Cantwell, the Krishna Consciousness Movement, and, indeed, every religion which engages in fund-raising to an inquest into the truth of the underlying religious beliefs espoused. It would permit, for example, a jury to find that representations of the Catholic Church concerning heaven and hell are false, and are motivated by the church's purpose to obtain contributions from the faithful. *See Estate of Supple,* 247 Cal. App. 2d 410, 55 Cal. Rptr. 542 (1966), *cert. denied,* 389 U.S. 820 (1967).

The opinion of the Court of Appeals will serve as a catalyst for inquiries into the validity of the religious beliefs of numerous minority religious organizations throughout the country, which necessarily engage in fund-raising proselytization. It will encourage juries to act out their prejudices and preconceptions against such churches by finding that they are motivated by such secular purposes, and by imposing punishment against them.

3. The Court of Appeals decision approving the imposition of punitive damages against a church for the purportedly false oral representations of its staff members concerning the value of church practices violates both the Establishment and Free Exercise clauses, and is contrary to recent decisions of this Court disapproving the use of punitive damages in analogous contexts.

This Court on more than one occasion has warned of the dangers to minority groups or opinions inherent in jury awards of punitive damages.

> Juries assess punitive damages in wholly unpredictable amounts bearing no necessary relation to the actual harm

> caused . . . They remain free to use their discretion selectively to punish expressions of unpopular views.

Gertz v. Robert Welch, Inc., 418 U.S. 323, 350 (1976). *See also, International Brotherhood of Electrical Workers* v. *Foust*, 442 U.S. 42, 50 n. 14 (1979) ("punitive damages may be employed to punish unpopular defendants.")

The threat to First Amendment rights in the use of punitive damages is particularly acute when they are imposed against a minority religious group in a case in which the only tort alleged arises out of expressive activity. The probability that such a trial will be converted into a witch hunt is amply demonstrated by this very case, in which the plaintiff's expert witness testified that Scientology "is on trial" (Tr. 1418) and in which the plaintiff's counsel repeatedly referred to the then-recent horrible occurrences at Jonestown, (with which Scientology had no connection or similarity), referred to Scientology as "locusts from Davis, California" who had "taken over" Oregon, commented disparagingly about the beliefs and practices of Scientology, and warned the jurors that Scientology was going to "change our city and our state" unless the jurors put a "stop" to it (Tr. 3344). The pleas to the prejudices and emotions of the jury were successful, as the jury awarded nearly two million dollars in punitive damages.

Indeed, it does not require any great perspicacity to recognize that the reason why there has been such a flood of religious fraud litigation in the state and federal courts in the wake of the jury verdict in this case was precisely because plaintiffs and their attorneys saw an opportunity to exploit the obvious unpopularity and controversial nature of some of the newer religious movements.

The impact of such potential jury verdicts upon the treasury and administration of a church and upon the pocketbooks and loyalty of its members raises substantial questions under both the Free Exercise and Establishment clauses. *United States* v. *Ballard*, 322 U.S. 78; *Lemon* v. *Kurtzman*, 403 U.S. 602, 612-613 (1971). It significantly restricts the ability of a church to engage in its practices and programs, inhibits the exercise of

constitutionally protected rights to proselytize, *Cantwell* v. *Connecticut,* 310 U.S. 296; *Murdock* v. *Pennsylvania,* 319 U.S. 106, and discourages members from contributing to the faith, and even from remaining members. This is especially true with respect to minority religious sects, which both are more financially vulnerable to such awards, and more subject to the disapproval of jurors.

Additionally, the mere availability of punitive damages fosters excessive government entanglement with religion. *Lemon* v. *Kurtzman,* 403 U.S. at 612-613. This is so for two reasons. First, in most states, including Oregon, the court and jury in assessing punitive damages are permitted and even required to consider the financial resources and programs of the Church. Thus, in this case, the plaintiff was permitted broad inquiry into the financial status and religious doctrines and practices of the Church and Mission defendants, and such evidence was presented to the jury and relied upon by the plaintiff in her request for punitive damages. Such "extensive state investigation into church operations and finances" is impermissible. *Walz* v. *Tax Commission,* 397 U.S. 664, at 691 (1970) (Brennan, J., concurring), and at 676 (Opinion of the Court). *See Surinach* v. *Pesquera de Busquets,* 604 F.2d 73 (1st Cir. 1979). Second, the imposition of a penalty upon church treasuries "would bear unequally on different churches" depending upon their ability to withstand a substantial jury verdict, and "would surely influence the allocation of church resources." *Walz,* 397 U.S. at 69 (Brennan, J., concurring).

The violations of the Free Exercise and Establishment Clauses arising out of the imposition of punitive damages against religious organizations cannot be justified on the ground that such awards further a compelling state interest, let alone by the least restrictive means. *Sherbert* v. *Verner,* 374 U.S. 398 (1963). "Only those [state] interests of the highest order and those not otherwise served can over-balance legitimate claims to the free exercise of religion." *Wisconsin* v. *Yoder,* 406 U.S. 205, 215 (1972).

The very purposes of punishment and deterrence furthered by awards of punitive damages, *Gertz* v. *Robert Welch, Inc.,*

418 U.S. at 350, are constitutionally suspect when the conduct sought to be punished or deterred is speech about religious practices. The danger that protected religious speech also might be punished or deterred by such awards is great indeed.

Even if it can be assumed that there is a state interest in protecting members of religious organizations from "fraudulent" representations about non-coercive religious practices, but see discussion *ante* at 9-14[17], that interest is amply served by awards of compensatory damages. The state has "no substantial interest in securing for plaintiffs . . . gratuitous awards of money damages far in excess of any actual injury." *Gertz* v. *Robert Welch, Inc.*, 418 U.S. at 349. If the state retains any legitimate interest at all in punishment or deterrence of "fraudulent" religious speech, that interest may be met by resort against the individual who made the offending representations, and not against the entire church. To award a plaintiff a windfall at the expense not only of the Church, but of the faithful membership of the Church, imposes too great a burden on religious exercise and speech and creates too great a threat of punishing unpopular sects. See *Loney* v. *Scurr*, 474 F. Supp. 1186 (S.D. Iowa 1979).

Similar considerations recently led this Court to prohibit the imposition of punitive damages against labor unions for breaches of their duty of fair representation. *International Brotherhood of Electrical Workers* v. *Foust*, 442 U.S. 42 (1979). The Court found that punitive damage awards could "deplete union treasuries, thereby impairing the effectiveness of unions as collective bargaining agents", *id.* at 50-51, and inhibit the union in carrying out discretionary acts "essential to the proper functioning of the collective bargaining system." *Id.* The impact of such awards would be felt principally by the membership of the union and would have the effect of burden-

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17 Heretofore it has only been in connection with preventing frauds against the general public that the Court has recognized a possible interest in regulating the time, place and manner of soliciting by a religious organization. It has never sanctioned attempts to regulate the *content* of religious appeals nor suggested that the state can extend its regulatory arm into the church's inner sanctum.

ing the exercise of associational and collective bargaining rights guaranteed by the National Labor Relations Act. Although the Court found that the state's policy of awarding punitive damages might be rational in other contexts, it could not be applied in a manner which would undermine the policies furthered by the NLRA. 442 U.S. at 48.

Similarly, in *Newport* v. *Fact Concerts, Inc.*, 453 U.S. 247 (1981), the Court held that municipalities are immune from punitive damage awards under 42 U.S.C. § 1983 because it would not be equitable to provide a windfall to a plaintiff by punishing taxpayers for the unconstitutional act of a city official. *See also, Heritage Homes of Attleboro, Inc.* v. *Seekonk Water District*, 670 F.2d 1 (1st Cir. 1982).

Surely the rights of religious association and free exercise protected by the First Amendment are on at least as high a plane as the rights of association and collective bargaining furthered by the NLRA, and the general interests of taxpayers to avoid paying penalties for the illegal acts of municipal employees. Just as surely, the threat of imposition of huge punitive damage awards against minority religious groups is much greater than the threat of such awards against labor unions or municipalities, since it is much more likely that at least some jurors will be sympathetic to the interests of the union rank and file or the taxpayers than to the rights of an unpopular sect. Accordingly, the Court should apply the rationale of the *Foust* and *Newport* decisions to religious organizations, at least in cases in which the claim against the religious organization arises out of written or oral speech.

4. This case raises the substantial question of whether and under what circumstances a religious organization may be held liable for the tortious representations of its staff members or clergy. *Cf.*, *NAACP* v. *Claiborne Hardware*, ____ U.S. ____, 102 S. Ct. 3409 (1982); *Rizzo* v. *Goode*, 423 U.S. 362 (1976); *Monell* v. *New York City Department of Social Services*, 436 U.S. 658 (1978).

In *Claiborne Hardware*, the Court held that the First Amendment rights of the NAACP and its members to associ-

ate and to engage in protected concerted action required that the organization itself be protected from liability for the unauthorized acts of its members in furtherance of such concerted action. Only if the NAACP authorized or ratified the specific tortious acts alleged could it be held liable, even if the tortious acts could be found to have furthered the goals of the general course of concerted conduct. 102 S. Ct. at 3428-3430.

Analogous considerations led this Court to conclude that municipalities cannot be held liable under 42 U.S.C. § 1983 upon a *respondeat superior* basis because, under the Tenth Amendment, neither the Congress nor the federal courts can dictate the terms and conditions upon which a state hires or controls its employees. *Monell* v. *New York City Department of Social Services*, 436 U.S. 658, 673, 691 (1978); *cf.*, *Rizzo* v. *Goode*, 423 U.S. 362, 376-78 (1976). Thus, the Court held that a municipality could be held liable under § 1983 only when it authorized or ratified unlawful conduct.

The rationale of *Claiborne Hardware* and *Monell* applies to religious organizations, which are protected not only by the associational rights of the First Amendment, but also by the more specific religion clauses of that Amendment. Just as in *Claiborne Hardware* a damage award against the NAACP ultimately would be felt by the membership and would inhibit their rights to associate and to engage in concerted political activity, so too, a damage award against a church ultimately would be directed principally against the membership, and would inhibit the exercise of religion by both the church and its members. See discussion of the effects of punitive damage awards, *ante* at 18-21. And, just as in *Monell* and *Rizzo* the Court could not impose upon a city a code of discipline for its employees, so too, neither the legislature nor the courts can define or monitor the relationship that obtains between a religious organization and its employees. *NLRB* v. *Catholic Bishop*, 440 U.S. 490 (1979). The degree and manner of supervision that a church or religious body exercises over its employees is a matter for its own ecclesiastical boards and is the business of no other authority. The state cannot impose standards either directly or indirectly.

This is especially true when the tort which a clergyman is alleged to have committed is the making of religious misrepresentations. Under these circumstances, liability should attach to the church proper only if it can be shown that the alleged tortious statements were consistent with and authorized by the acknowledged and clearly enunciated policy or directives of the church. To permit inquiry as to whether or the extent to which a church has either sanctioned or tolerated the adoption of policies and practices which are contrary to the policies and practices which it has officially promulgated to its membership would make the court, rather than the church, the ultimate and definitive exponent of church doctrine. Moreover, to permit a church to be penalized for having tolerated non-conforming policies and practices would be to establish a degree of orthodoxy to which clergy must adhere. The state is incompetent to assume either of these roles.

The contrary is true. The First Amendment prohibits the judiciary from questioning the manner in which a church has characterized its religious policy and doctrine, from directing a church's religious affairs, and from determining for itself matters of ecclesiastical administration or discipline. *Serbian Eastern Orthodox Diocese* v. *Milivojevich,* 426 U.S. 696, 709 (1976); *Presbyterian Church in the United States* v. *Hull Memorial Presbyterian Church,* 393 U.S. 440 (1969); *In the Matter of the Holy Spirit Ass'n for the Unification of World Christianity* v. *New York State Tax Commission,* 55 N.Y.2d 512 (1982). Indeed, as this Court has emphasized, not only is the making of findings of fact and conclusions of law prohibited, but so too is the very process of inquiry. *NLRB* v. *Catholic Bishop,* 440 U.S. 490, 502.

This Court accordingly should grant the petition to review the holding of the Oregon Court of Appeals in this case sanctioning a searching judicial inquiry into the authorization of staff members to make statements of church policy contrary to the enunciated and established policy of the church concerning the very question of the religious character of church practices. The uncontroverted evidence in this case, as recog-

nized by the Court of Appeals, demonstrated that the official and acknowledged literature, rules and regulations, and policy of the Mission emphasized the religious nature of the Mission, its courses and its practices, and stated explicitly that no contrary representations were authorized. The Court of Appeals decision that the respondent nevertheless can recover in fraud against the Mission if a jury were to find that a staff member made or authorized contrary statements for a secular purpose cannot stand under the First Amendment.

5. In ruling that the Mission must carry the burden of proving the religious purpose and character of the representations at issue, the Oregon Court of Appeals compounded the other errors to which this petition refers and imposed a further unconstitutional burden on the exercise of First Amendment rights. *Speiser* v. *Randall,* 357 U.S. 513 (1958); *First Unitarian Church* v. *Los Angeles,* 357 U.S. 545 (1958).

As the Court noted in *Speiser,* the burden of proof is often critical to the outcome of a case. Thus, where "the question is one of alleged trespass across the line between speech unconditionally guaranteed and speech which may legitimately be regulated", the plaintiff must bear the burden of proving with "convincing clarity" that the statements which are attributable to a defendant are susceptible of regulation. *New York Times* v. *Sullivan,* 376 U.S. 254, 285 (1964). Where the plaintiff alleges that the defendants committed a religious "fraud", the plaintiff must prove that the defendant's statements were wholly secular as made. The burden of proving the protected nature of the challenged communications cannot be placed upon the defendant.

In fact, under the Establishment Clause, unless and until the plaintiff has proven the non-religious nature of the statements alleged to be fraudulent, she has not established either the justiciability of the issues or the subject matter jurisdiction of the court. *Watson* v. *Jones; NLRB* v. *Catholic Bishop.* Plaintiff and not the defendant carries the burden on these questions. *See, e.g., Thomson* v. *Gaskill,* 315 U.S. 442 (1941).

In the final analysis, given an area so difficult of proof and subject to juror misunderstanding and abuse as the religious character and purpose of representations, the party challenging the nature of the representations must carry the burden. To put the burden on the organization claiming religious protection would be to sanction heresy trials and invite broad judicial inquiries into religious belief. Who bears the burden of proof is no less critical a question to the outcome of this and similar cases and to the maintenance of constitutional standards than was the question of burden of proof decided in *In re Winship*, 397 U.S. 358 (1970). The Court should grant certiorari to resolve this fundamental question.

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be granted.

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Respectfully submitted,

ERIC M. LIEBERMAN
Counsel for Petitioners
30 East 42nd Street
New York, New York 10017
(212) OX 7-8640

Of Counsel:

EMILY M. BASS
RABINOWITZ, BOUDIN, STANDARD,
KRINSKY & LIEBERMAN, P.C.
30 East 42nd Street
New York, New York 10017
(212) OX 7-8640

CHARLES J. MERTEN
KAREN FINK
RICHARD YUGLER
MERTEN & FINK
117 S.W. Taylor
Portland, Oregon 97204
(503) 227-3157